

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Establishment of a Class A
Television Service

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 99-292

RM-9260

To: The Commission

COMMENTS OF HOME SHOPPING CLUB LP

Home Shopping Club L.P. ("HSC"), pursuant to Section 1.415 of the Commission's Rules, respectfully submits these comments in response to the *Notice of Proposed Rule Making* in the above-captioned proceeding. ^{1/}

HSC urges the Commission to establish broad standards for Class A eligibility, as Class A status will enable these stations to obtain financing, to engage in long-term planning, to enter the world of digital television, and to better respond to the needs of their communities. In the Community Broadcasters Protection Act, Congress mandated the most basic level of protection that Class A status would afford LPTV stations, and even defined certain eligibility requirements Class A status. However, the CBPA left to the Commission the task of defining the public interest standards that may be used to confer Class A status. Unnecessary restrictions on Class A eligibility would

^{1/} On September 29, 1999, the Commission issued its initial notice in this proceeding. See *Notice of Proposed Rule Making, Establishment of a Class A Television Service*, MM Docket No. 99-292 ("Initial Notice"). Two months later, on November 29, 1999, the Community Broadcasters Protection Act of 1999 (the "CBPA"), which also addressed the status of low power television stations, was signed into law. Accordingly, on January 13, 2000, the Commission issued an *Order and Notice of Proposed Rule Making* in order to terminate the *Initial Notice* and to request comment on issues raised by the CBPA and related matters (the "Second Notice").

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be irrational and unfair and would eliminate a major public benefit of the Commission's initial Class A proposal: namely, the incentive provided by Class A status to improve existing LPTV facilities which already contribute to diversity and competition in the marketplace.

HSC distributes electronic retail programming to full power and low power television stations and cable systems. Electronic retail programming affords an opportunity for viewers to purchase products they want or need without leaving their homes. HSC has 122 affiliates, 75 of which are LPTV stations.

I. THE COMMISSION SHOULD USE CLASS A STATUS AS THE CBPA INTENDS: A MEANS TO MAINTAIN AND DEVELOP ACTUAL VIDEO PROGRAMMING DIVERSITY.

In the *Second Notice*, the Commission inquired as to whether the CBPA authorizes Congress to grant Class A LPTV status to stations only during a brief period following passage of the CBPA, or on a going-forward basis. ^{2/} Any time limits on Class A eligibility would be contrary to the purposes that motivated the passage of the Act. Moreover, a failure to use Class A status as a means to encourage all LPTV licensees to continue to provide quality diverse programming would be contrary to the interests of the public, which merits more such programming alternatives via free broadcast television.

^{2/} *Second Notice* at ¶ 9.

A. The Text and Purposes of the CBPA Demonstrate that the Commission Should Continue to Designate LPTV Stations for Class A Status on a Going-Forward Basis.

The plain language of the Act confirms that Congress did not intend the CBPA to be the beginning and the end with regard to defining the stations that qualify for Class A status. Under the CBPA, an LPTV station qualifies for Class A status if either one of two circumstances is true:

A) during the 90 day period ending November 28, 1999:

- it has broadcast a minimum of 18 hours per day; and
- it has broadcast at least three hours per week of locally produced programming; and
- it has complied with Commission rules on LPTV service;

OR

B) the Commission determines that such qualification would serve the public interest, or for other reasons determined by the Commission.

The inclusion of paragraph B makes clear that Congress did not want to foreclose stations that did not comply with the CBPA's requirements as of November 28, 1999 from achieving Class A status. Accordingly, under the CBPA, Congress authorized the Commission to grant Class A status to any LPTV station, *without requiring the station to have aired any particular type of programming during any particular period*, so long as that grant is in the public interest.

The stated purposes of the CBPA corroborate that Congress intends the Commission to grant Class A status to stations on a broad and going-forward basis. In the statute's findings, Congress acknowledged that "[i]t is in the public interest to promote diversity in television programming such as that currently provided by low-

power television stations.” 3/ Further, the Act noted that, prior to the passage of the CBPA, the secondary nature of LPTV stations “has blocked many low-power broadcasters from having access to capital, and [has] severely hampered their ability to continue to provide quality broadcasting, programming or improvements.” In light of such avowed purposes of the CBPA -- to better enable LPTV licensees to obtain a reasonable level of financing and stability -- it would be nonsensical to read the statute to limit application of Class A status to only those stations that had provided certain types of quality programming *prior to enactment of the CBPA*. Rather, the establishment of Class A status must preserve and promote the programming diversity afforded by LPTV stations, not just at the time of the statute’s enactment, but throughout the digital transition period and beyond.

B. Class A Status Must Be Used to Encourage Programming Diversity, Including Specialty or Unique Programming That Is Not Otherwise Available To A Particular Local Broadcast Market.

As Congress recognized, the airing of local programming is not LPTV's only public service, or even its most important one. After all, locally originated programming is not guaranteed to be any more of interest to a particular community than programming produced elsewhere. In addition, the location where certain programming was produced does not testify to the quality or uniqueness of the programming. Simply stated, just because programming is not locally produced does not undermine its contribution to programming diversity. Indeed, diverse programming that is not local in origin may better serve the many specialized audiences – such as children, the elderly, students, tourists, farmers and boaters, as well as ethnic groups –

3/ CBPA at Section (b)(5).

of the typical LPTV station. ^{4/} Such groups may be far better served by outside programming targeting their specific interests than unrelated programming that just happened to be created on the other side of their town.

Accordingly, it makes sense that, in approving LPTV service, the Commission identified as its "first decision criterion" the glaring "public need for program diversity" on broadcast television, including "*diverse* or local program service." ^{5/} The ordering is appropriate, for it is uniformly more important that LPTV stations offer their audiences the option of additional quality programming than where that programming is produced. Moreover, LPTV stations typically must seek to provide distinct, quality programming before they can afford to create any type of quality local programming.

Such reasoning also confirms what common sense would suggest: all LPTV eligibility for Class A status should not be dependent on some type of hourly quota of local programming. The public service that LPTV stations provide simply cannot be measured in the number of hours that they choose to show programming created locally rather than in a Hollywood back lot. Instead, consistent with the essential goal of LPTV stations – to foster *real* programming diversity -- LPTV stations that continue to dedicate themselves to providing unique, quality programming, wherever produced, to their audiences should be able to attain Class A status.

Consistent with such reasoning, the Commission should develop criteria that would enable LPTV stations that contribute to program diversity – including those

^{4/} First Report and Order at ¶ 2.

^{5/} First Report and Order, Review of the Commission's Rules Governing the Low Power Television Service, 9 FCC Rcd 2555 (¶2, 13) (1994) ("*First Report and Order*") (emphasis added).

providing electronic retail programming -- to achieve Class A status. Electronic retail programming provides a "shop from home" option accessible to all, even those unfamiliar with or unable to access the Internet or those unable to travel far outside the home. In the past, the Commission has acknowledged the "important" benefits of this programming to such groups, as well as to other audiences. 6/

The Commission should establish eligibility criteria under the public interest determination that look to whether an LPTV station is offering video programming that is not otherwise available via free, over-the-air broadcasts in the relevant area. If so, the Commission should deem the LPTV station eligible for Class A status. Such a step would be consistent with the underlying purpose of LPTV service, the CBPA and the public interest, because the provision of such unique, quality programming is itself a significant benefit to the public.

C. Whatever Class A Eligibility Criteria Are Ultimately Adopted, The Commission Must Afford LPTV Stations The Opportunity To Satisfy Such Requirements.

To the extent the Commission decides to make Class A eligibility dependent upon the provision of local programming or on any other characteristic, HSC urges the Commission to grant Class A status to LPTV stations that satisfy such requirements in the future. It would be irrational for the Commission to extend Class A protection only to those licensees that were able to guess what would be necessary to attain such status prior to the completion of this rule making proceeding. In particular, it

6/ See, e.g., *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992: Home Shopping Station Issues*, MM Docket No. 93-8 (released July 19, 1993) ("Accordingly. . . we find that home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner.")

would offend fundamental fairness for the Commission to exclude LPTV stations that have not, to date, developed local program components from the benefits of Class A status. Only by allowing Class A LPTV stations to meet its eligibility requirements in the future will the Commission acknowledge consideration the economic realities that have and continue to confront LPTV stations – as recognized expressly in the CBPA.

Historically, LPTV has been a secondary service. As such, LPTV stations "may not cause objectionable interference to existing full service stations, and . . . must yield to facilities increases of existing full service stations or to new full service stations where interference occurs. ^{7/} The secondary status of LPTV stations has resulted in unavoidable instability for LPTV stations, which limits their ability to attract the capital needed to develop such facilities.

The recent threat of DTV displacement only has increased the uncertainty plaguing LPTV stations, and exacerbated their inability to justify further investment. The Commission recognized when it adopted the DTV Table of Allotments that it would be necessary to displace a number of LPTV stations to provide all full power television stations with a second channel. ^{8/} That, and the congressional directive to auction Channels 60-69, has resulted in the loss of channels on which LPTV stations can provide diverse programming to their local markets.

As a result of all of this uncertainty, LPTV stations have had little incentive to make any investment, never mind the substantial investment required to develop

^{7/} *Report and Order* at ¶ --- (p. 486); *see also id.* at n. 23 "[Because] it is integral to the concept of a secondary service that it yields to a mutually exclusive primary service, we shall not take low power stations into account in authorizing full service stations, and we urge low power applicants to consider this fact when they select channels."

^{8/} *See, e.g., Sixth Report and Order, Advanced Television Systems and Their Impact on Existing Television Broadcast Service*, MM Docket No. 87-268, at ¶ 141.

local program production capabilities. The Commission would unfairly penalize LPTV stations that were not recently airing local program components if it were to condition

Class A status on whether the station currently provides local programming.

II. COMPLIANCE WITH PART 73 OF THE COMMISSION'S RULES WOULD IMPOSE AN UNDUE BURDEN ON LPTV STATIONS

HSC urges the Commission not to impose Part 73 regulations on Class A LPTV stations. Such an imposition would thwart Congress' intent in creating Class A LPTV status because the burdens of complying with Part 73 would outstrip the benefits of Class A status. At the very least, the Commission should not impose Part 73 burdens on LPTV licensees until such time as LPTV stations are entitled to the same regulatory benefits as Part 73 licensees.

Full-power television stations licensed under Part 73 of the Commission's rules enjoy significant advantages over LPTV stations which likely will not be changed by LPTV stations gaining Class A status. Foremost among these advantages are (1) the substantially higher power levels at which full-power stations may operate, (2) the ability of full-power stations to demand must-carry on cable systems and (3) the second 6 MHz channel that was awarded to all full-power television stations for digital operations. Each of these benefits directly enhances full-power television stations' ability to serve greater audiences than their LPTV counterparts, which have limited off-air coverage due to their low power levels, very limited must-carry rights and no second channel for digital transmissions. The disparity in the *benefits* conferred by regulation on full-power versus LPTV stations justifies the imposition of disparate regulatory *burdens* on full-power and LPTV stations. Class A status is an important step to

elevate LPTV stations from secondary to primary status. But not until all Part 73 benefits are available to Class A LPTV stations should Part 73 burdens apply to them.

Among other obligations, Part 73 requires all full-power television stations to have a main studio, 47 C.F.R. § 73.1125, which must be staffed. In HSC's experience, this single requirement would put Class A status beyond the reach of the typical LPTV station. Many of the LPTV stations affiliated with HSC do not have their own main studios. These types of cost-saving measures have enabled LPTV stations to provide service in areas where the maintenance of a separate studio and staff would not be economically feasible. Even with "secondary" status, LPTV stations have found a way to make their business work -- often with shoe-string operations -- in a manner that furthers the FCC's goal of promoting diversity. In the face of Congress' mandate to protect and preserve LPTV stations in the form of granting Class A status, it would be a great mistake to undermine the business model that is prevalent among these stations by importing a complicated regulatory model designed for full-power stations.

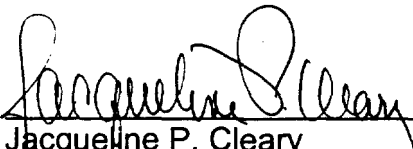
II. CONCLUSION

LPTV stations serve the public interest by increasing diversity. The Commission should interpret the CBPA to enable all LPTV stations that now contribute or that contribute in the future to programming diversity to achieve Class A status. To do otherwise would unfairly penalize LPTV stations that have been constrained in their efforts to fully realize the potential of their stations due to LPTV's historical secondary status. Further, the Commission should take other steps to enable LPTV stations to

maximize their potential with regard to both digital and analog operations, both now and following the transition period.

Respectfully submitted,

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